a subsequent claimant who gets title to the land from the government gets all fixtures thereon.[14] Some cases do, however, allow removal before the claimant abandons his rights.[15]

That the equitable doctrine of Miller v. Waddingham has any application to fixtures on public lands appears doubtful. While the claimant has a possessory title which will be protected against all third parties so long as he performs his obligations, yet Miller v. Waddingham would not apply unless it were held that equitable conversion operates against the government. In the principal case the former locator had forfeited all rights before he attempted a removal, so the question of what his rights would have been before default did not require determination.

D. J. W.

PROPERTY: TERMINATION OF A TRUST: MEANING OF GIFT OVER TO "CHILDREN": ARE ADOPTED CHILDREN INCLUDED?—The decision in the case of *Fletcher v. Los Angeles Trust & Savings Bank*[1] is questionable. In this case, by the will of the testator, a trust fund was created and placed in the hands of a trustee who was to pay the net income therefrom to the testator's daughter, Annie K. Fletcher, "so long as she shall live" and "upon her death", the said fund with all accumulations therefrom, if any, were to be given to the "children of said Annie K. Fletcher to be equally divided among them by the said trustee share and share alike." Plaintiffs Mrs. A. K. Fletcher, the holder of the life estate, and her only child, Kimball Fletcher, brought this action to terminate the trust and to compel the trustee to pay over, assign and convey the trust fund to them. The judgment for plaintiffs was affirmed on appeal.

At the time of the trial of the action, Mrs. Fletcher was fifty-five years of age. Facts were established by the evidence in the case which negatived the possibility of birth of other children by her. Upon this evidence the court held that the remainder to Kimball Fletcher was vested. Two questions arise from this holding: (1) Was the remainder vested absolutely? (2) Should such evidence of physical impossibility be admitted to rebut the time-honored presumption of the law that there is possibility of issue until death?

A gift to a number of persons not named, but answering a general description, is a gift to them as a class. What persons constitute the class is to be ascertained when the time comes at which the gift takes effect.[2] Where the remainder is to

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[14] Hiatt v. Brooks (1885) 17 Nebr. 33, 22 N. W. 73; Collins v. Bartlett (1872) 44 Cal. 371; McKiernan v. Hesse (1877) 51 Cal. 594.

[15] McKiernan v. Hesse, supra, n. 15.

[1] (March 10, 1919) 28 Cal. App. Dec. 548.

[2] 73 Am. St. Rep. 413, note; In re Denlinger's Estate (1895) 170 Pa. St. 104, 32 Atl. 573; Cal. Civ. Code §§ 1336, 1337.

the "children" of the life tenant as in the principal case, the gift will include all children who answer the description at the time of the death of the life tenant, when the precedent estate terminates, whether such children were born before or after the death of the testator.[3] The question follows whether, in a gift of a life estate with a remainder over, the remaindermen take vested or contingent interests? "Where there is a remainder to a class of persons, as to children, grandchildren, issue, or brothers and sisters, all the members of the class living at the time of testator's death . . . . take prima facie vested remainders; the benefit of the provision being, however, extended to others of the same class who afterwards come into being before the determination of the particular estate, the shares of those previously born being in that case proportionately diminished. Thus, in the case of a devise to A for life, and after his death to his children, all such children living at testator's death take a vested remainder, and likewise those afterwards born before the termination of A's life estate, though until one of such class is in being, the remainder is, of course, contingent".[4] This does not conflict with Civil Code section 694, but merely shows that while the remainder to Kimball Fletcher was vested at the death of the testator, it was not vested absolutely, but was subject to be opened and to let in those afterwards coming under the term of description, i. e., "children". His remainder was then defeasibly vested and would be divested *pro tanto* upon the birth of other "children."

The court assumed from the evidence that there could be no other children, and hence that the class was closed. This would seem to be an erroneous view. Gray in his excellent work on the Rule against Perpetuities says:[5] "In one class of cases, from the difficulty and delicacy of determining the question involved, the occurrence of a contingent event beyond the required limits will be considered as possible although it is physically impossible. For the purpose of applying the rule against perpetuities, both men and women are considered capable of having issue so long as they live." This was held by Sir Lloyd Kenyon in Jee v. Audley,[6] and his decision has never been questioned. In Sayer's

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[3] Ayton v. Ayton (1787) 1 Cox 327, 29 Eng. Rep. 1188; Teed v. Morton (1875) 60 N. Y. 504; Ridgeway v. Underwood (1873) 67 Ill. 419; Evans' Estate (1893) 155 Pa. St. 646, 26 Atl. 739; Kent v. Ch. of St. Michael (1892) 136 N. Y. 10, 32 Am. St. Rep. 693; Coggins v. Flythe (1893) 113 N. C. 102, 18 S. E. 96.

[4] 1 Tiffany Real Property 291; Shattuck v. Stedman (1824), 2 Pick. (Mass.) 467; Campbell v. Stokes (1894) 142 N. Y. 23, 36 N. E. 811; 73 Am. St. Rep. 413, note.

[5] At §§ 215, 215a, 376.

[6] 1 Cox 324, 29 Eng. Rep. R. 1186.

[6] 1 Cox 324, 29 Eng. Rep. 1186.

[7] L. R. 6 Eq. 319.

Trusts[7] Malins V. C. followed Jee v. Audley.[8] In the latter case the court said, "I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children (they were 70 years old); but if this can be done in one case it may in another, and it is a very dangerous experiment and introductive of the greatest inconvenience to give a latitude to such sort of conjecture." By the weight of authority, in matters relating to the character and devolution of estates, whether the rule against perpetuities is involved or not, there is a conclusive presumption of law that there is no limit during life to the possibility of issue, and that the question whether a particular person was in fact incapable of having issue when an instrument was made or took effect is not open to investigation.[9]

It is to be regretted that the court summarily rejected the contention that an adopted child falls under the description of "children" in a will, especially in view of the fact that the Supreme Court has declared in most general terms that an adopted child is a "child".[10] Under section 230 of the Civil Code it has been recently held that the relation of parent and child was established.[11] There is respectable authority in other states to the effect that adopted children for all purposes are regarded as "children." Some courts and some statutes make a distinction between the cases where the question arises between the person adopted and the adopting parent's estate, and where the question is whether an adopted child of a third person, as in the present case, is to be considered as a "child". The question is well worthy of careful consideration, and it may be doubted whether the present decision, in view of the fact that it cites no authorities and devotes no discussion to this interesting point, will be regarded as determinative of the construction of instruments giving interests to children where the rights of adopted children are involved.[12]

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[8] In re Dawson (1888) L. R. 39 Ch. Div. 155; Stout v. Stout (1888) 44 N. J. Eq. 479, 15 Atl. 843; Flora v. Anderson (1895) 67 Fed. 182.

[9] Flora v. Anderson (1895) 67 Fed. 182, 183. Lord Coke says (Co. Litt. 28a): "But if a man giveth land to a man and his wife and to the heirs of their bodies and they live until each of them be an hundred years old and have no issue, yet do they continue tenant in tail, for that the law seeth no impossibility of having children."

[10] In re Estate of Wardell (1881) 57 Cal. 484, 491; Johnson's Appeal (1879) 88 Pa. St. 346, 30 L. R. A. (N. S.) 914, note.

[11] 6 California Law Review, 158, 159.

[12] Sewall v. Roberts (1874) 115 Mass. 262, 276; Warren v. Prescott (1892) 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370; Fisher v. Gardiner (1915) 183 Mich. 660, 150 N. W. 358; Wilder v. Wilder (1917) 102 Atl. 110 (Me.); Woodcock's Appeal (1907) 103 Me. 214, 68 Atl. 821, 125 Am. St. Rep. 291; Hartwell v. Tefft (1896) 19 R. I. 644, 35 Atl. 882; Re Newman (1888) 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146. Contra: In re Comassi (1895) 107 Cal. 1, 40 Pac. 15 (limited to effect of "issue" to work a revocation of a will.

Finally the court holds that the trust may be terminated by decree with the consent of all parties in existence in whom the beneficiary rights in the trust are vested. If it be admitted that the interest in Kimball Fletcher is not vested absolutely, that there is a contingent remainder in those who may afterwards come under the term "children"; then all the parties in interest are not before the court. It is only when all the parties in interest are before a court, when each is *sui juris* and all join in the application, that a court of equity ever terminates a valid trust; even then it is discretionary on the part of the court.[13] If all the parties in interest are not before the court equity has no power to terminate the trust.[14] The court relies on the case of Eakle v. Ingram,[15] but fails to differentiate the case at bar from the principle of that case. In Eakle v. Ingram, we find a bare trustee, without any interest except that he might but for the decree have become entitled to compensation for services as trustee. This, of course, furnished no reason for the continuance of the trust.[16] The holder of the life estate had died, and the terms of the trust were therefore carried out to the letter. In the principal case, we have an active trust, the life tenant still lives, and the words of the trust "upon her death, I give, devise and bequeath the trust fund, ... to the children of said Annie K. Fletcher," clearly show the intent of the testator that the trust shall not terminate until the happening of that event. The courts respect the express provisions as to the duration of a trust, unless it is clearly shown that its purpose has been fully accomplished or rendered impossible of accomplishment.[17] They should be careful not to defeat any object of the trustor apparent from his declaration of the purposes of the trust. To this end the courts must decline to act

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[13] 2 Perry Trusts and Trustees § 920; Gray v. Union Trust Co. (1915) 171 Cal. 637, 641, 151 Pac. 275; Stone, Petitioner (1885) 138 Mass. 476, 479; Estate of Yates (1915) 170 Cal. 254, 149 Pac. 555; Godfrey v. Roberts (1903) 65 N. J. Eq. 323, 55 Atl. 353; May v. Walter's Executors (1906) 30 Ky. L. R. 59, 97 S. W. 423; In re Lewis' Estate (1911) 231 Pa. 60, 79 Atl. 921; Kimball v. Blanchard (1906) 101 Me. 383, 64 Atl. 645; Brandenburg v. Thorndike (1885) 139 Mass. 102, 104, 28 N. E. 575.

[14] Cal. Civ. Code § 2280; Brown v. Brown (1895) 97 Ga. 531, 25 S. E. 353; Williams v. Kidd (1915) 170 Cal. 631, 637, 644, 151 Pac. 1; Young v. Snow (1897) 167 Mass. 287, 45 N. E. 686; Cuthbert v. Chauvet (1893) 136 N. Y. 326, 32 N. E. 1088; 39 Cyc. 99.

[15] (1904) 142 Cal. 15, 75 Pac. 566.

[16] Slater v. Hurlbut (1888) 146 Mass. 308, 315, 15 N. E. 790; Eakle v. Ingram (1904) 142 Cal. 15, 75 Pac. 566; Armistead's Executors v. Hartt (1899) 97 Va. 316, 33 S. E. 616; Donaldson v. Allen (1904) 182 Mo. 626, 81 S. W. 1151; Tilton v. Davidson (1903) 98 Me. 55, 56 Atl. 215; Blake v. O'Neal (1908) 63 W. Va. 483, 61 S. E. 410; Sears v. Choate (1888) 146 Mass. 395, 397, 15 N. E. 786.

[17] Young v. Snow (1897) 167 Mass. 287, 45 N. E. 686; Kendall v. Gleason (1890) 152 Mass. 457, 25 N. E. 838; Hoffman v. New Eng. Trust Co. (1905) 187 Mass. 205, 72 N. E. 952; 2 Perry Trusts and Trustees, § 920; Prentice v. Hall (1871) 106 Mass. 595.

when there are, or may be, persons interested in the trust who are not before the court, or if before it, not competent to act for themselves;[18] or where the trust remains an active trust;[19] or where, though all the parties are *sui juris* and consent, it yet is evidenced that the intention of the trustor, or some legislative policy, may be thwarted if the trust is not continued.[20]

M. H. V. G.

QUASI-CONTRACTS: BLOOD RELATIONSHIP: THE PRESUMPTION OF GRATUITOUS SERVICES BY RELATIVES.—Ordinarily, the law will imply a promise to pay for services rendered and accepted. The rule is founded upon a presumption and may be rebutted by proof of a special agreement to pay either a particular amount or in a particular manner; or by proof that the services were intended to be gratuitous, either as an express gift or under circumstances from which the law will raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby.[1] Among the several exceptions to the general rule are those cases of services rendered by members of a family, including near and distant relatives to a certain degree, connected either by consanguinity or affinity, who are residing under one roof.[2] In such cases the law will not imply a promise of compensation for certain services rendered; the reason being that there exists a domestic relationship, the incidents of which include an exchange of such gratuities.

Therefore, whenever this domestic or family relationship exists, the usual presumption of payment for services rendered is negatived. An examination of the authorities will show that the emphasis is put on this family relationship rather than on blood relationship.[3] It is clear that volunteer services may exist, as well between strangers as between blood relatives, but unless they are living together there should be no presumption of gratuities in either case.[4] Yet, in *Gopcovic v. Gopcovic*,[5] the court said: "Indeed, it may well be doubted whether the plaintiff's evidence, if uncontradicted, would have constituted a contract

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[18] Thurston, Petitioner (1891) 154 Mass. 596, 29 N. E. 53; Harris v. Harris (1903) 205 Pa. St. 460, 55 Atl. 30; In re Goodal (1885) 64 Wis. 210, 25 N. W. 30.

[19] Smith v. Smith (1897) 70 Mo. App. 448; Appeal of Watson (1889) 125 Pa. St. 340, 17 Atl. 426.

[20] Lent v. Howard (1882) 89 N. Y. 169; Carney v. Kain (1895) 40 W. Va. 758, 23 S. E. 650.

[1] Moulin v. Columbet (1863) 22 Cal. 508; Murdock v. Murdock (1857) 7 Cal. 511, 513.

[2] Page v. Page (1905) 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; 133 Am. St. Rep. 250n.; Williams v. Williams (1902) 114 Wis. 79, 89 N. W. 835.

[3] Woodward, The Law of Quasi-Contracts, p. 84.

[4] Page v. Page (1905) 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510.

[5] (Dec. 27, 1918) 28 Cal. App. Dec. 31, 33, 178 Pac. 734, 736.